No._____

Supreme Court, U.S.
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In The Supreme Court Of The United States

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OCTOBER TERM, 1998

JOANN CARPENTER,

Petitioner,

v.

FEDERAL NATIONAL MORTGAGE ASSOCIATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUPPLEMENTAL APPENDIX TO PETITION FOR *WRIT* OF *CERTIORARI*

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 98-563

JOANN CARPENTER,

Plaintiff,

v.

FEDERAL NATIONAL MORTGAGE ASSOCIATION,

Defendant.

MEMORANDUM OPINION AND ORDER

This action comes before the Court on Defendant Federal National Mortgage Association's Motion for Summary Judgment. The Court has carefully considered Defendant's Motion for Summary Judgment, Plaintiff's Opposition to this Motions and Defendant's Reply thereto. For the reasons set forth herein, Defendant's Motion for Summary Judgment is granted.

I. Background

Plaintiff Joann Carpenter has served as a Vice President in the Office of General Counsel at the Federal National Mortgage Association ("Fannie Mae") from 1987 to the present. She brought an action for gender discrimination and retaliation against Fannie Mae on October 17, 1996. In that action, after the close of discovery, Fannie Mae filed a motion for summary judgment which this Court granted in an October 28, 1997 memorandum opinion and order.

Plaintiff filed another action on March 5, 1998 for retaliation. That action is the subject of this opinion. Here, Carpenter claims that Fannie Mae retaliated against her for bringing the prior lawsuit by not selecting her for a Senior Vice President position and by downgrading her performance rating by one-half step in 1997. According to Carpenter, soon after she filed the 1996 lawsuit, Anastasia Kelly, one of Carpenter's supervisors, told her that she "should not cut off her nose to spite her face." Anthony Marra, another one of her supervisors allegedly said that she should drop her claim. According to Carpenter, due to the contentiousness of the earlier litigation, her working relationship with her supervisors became strained.

Carpenter applied for a Senior Vice President position in 1997. The Position Description for this position called for, among other things, a candidate with litigation experience. Carpenter does not have experience in litigation. Carpenter states that she is qualified for this position. She submitted a written summary of her qualifications when she applied. Fannie Mae interviewed Carpenter for the position, but did not select her for further consideration. At the time Fannie Mae filed this motion, it had not yet selected the person to fill this position. It had, however, narrowed down the pool to three external candidates, all of whom possessed extensive litigation experience.

Also, Carpenter contends that she should have received a higher rating than she did for her 1997 performance. Fannie Mae evaluates its employees annually. It gives each person a numerical rating on a scale of 1 to 5. This rating corresponds with a written description: 5 indicates that the person significantly exceeded her objectives, 4 indicates that the person frequently exceeded her objectives, etc. Compensation decisions are based directly on the numerical performance rating. Part of what determines an employee's rating is how that person compares to others in the same position.

In both 1995 and 1996 Carpenter received a 5- In 1997 she received a 4+ Carpenter states that she should have received a 5- because her performance has not changed since 1996 Fannie Mae reorganized its legal department in July 1996 As a result, more people served as Vice President than in previous years The only Vice Presidents who received a better rating than Carpenter in 1997 were persons to whom Carpenter had never been compared and Joseph Biegel who received a higher rating than Carpenter in 1996

II. Discussion

Carpenter claims that Fannie Mae retaliated against her in violation of the District of Colombia Human Rights Act ("DCHRA") D C Code § 1-2501 et seq [1] Specifically, Carpenter claims that Fannie Mae failed to promote her to Senior Vice President and downgraded her performance by one-half step because she brought a discrimination claim in 1996

Fannie Mae filed a motion for summary judgment prior to discovery Rule 56(f) of the Federal Rules of Civil Procedure determines whether the Court should grant a

[1] In interpreting the DCHRA, the District of Columbia looks to federal statutes and case law See Blackman v Visiting Nurses Assoc , 694 A 2d 865, 868 (D C 1997)

summary judgment motion prior to discovery. Fed R Civ P. 56(f). It gives the Court discretion to allow discovery prior to granting summary Judgment where "it appear[s] from the affidavits of a party opposing the motion that the party cannot for the reasons stated present by affidavit facts essential to justify the party opposition..." Id. The Court "...should continue a summary judgment motion upon a good faith showing by affidavit that the continuance is needed to obtain facts essential to preclude summary judgment." State of California v. Campbell, 138 F.3d 772, 779 (9th Cir. 1998). The nonmoving party has the burden of showing what facts she hopes to discover that would create a triable issue of fact and what reason justifies her inability to produce them on the motion. Hotel & Restaurant Employees Union, Local 25, et al. v. Attorney General of the United States, 804 F.2d 1256, 1259 (D.C. Cir. 1986). The party seeking a continuance must explain why she cannot present facts to oppose summary judgment and how additional discovery will promote the facts. Medina v. Runyon, Civ. A. No. 95-1446, 1996 WL 346960 at *1 (D.D.C. 1996). Here, the crux of this motion hinges on whether Carpenter can show that through discovery she can elicit facts that will demonstrate pretext.

A plaintiff can prove a retaliation claim through either direct or indirect evidence. Kale Kiristos v. CTS Hotel Management Corp., 95 F.Supp. 641, 665 (D.D.C. 1997); see O'Donnell v. Associated Gen. Contractors of Am., Inc., 645 A.2d 1084, 1086 (D.C. 1984) (Courts use the burden of proof for a claim of disparate treatment based on federal law in applying the District of Columbia Human Rights Act). Here, Carpenter contends that both direct and indirect evidence require the Court to deny Fannie Mae's Motion for Summary Judgment.

1 Direct evidence of retaliation

Carpenter asserts that direct evidence of retaliation precludes the Court from granting Defendant's Motion. A plaintiff may rely on direct evidence to prove retaliation. Kale Kiristos, 95 F.Supp. at 665. But direct evidence does not include stray remarks made in the workplace, particularly those made by a non-decision maker or those made by a decision-maker, but unrelated to the decisional process. Id. (citing Ayala-Gerena v. Bristol Myers Squibb Co., 95 F.3d 86, 96 (1st Cir. 1996). Rather, there must be a nexus between the stray remarks and the adverse employment decision. Id.

As direct evidence of retaliation, Carpenter points to statements Kelly and Marra allegedly made that she argues

threaten retaliation. According to Carpenter, Kelly told her that she "should not cut off her nose to spite her face." Marra stated that she should drop her claim. Carpenter states that they made these comments in attempt to make her drop her 1996 lawsuit. According to Carpenter, then, these remarks relate to her 1996 suit rather than the present one. Therefore, Carpenter is essentially conceding that there is no nexus between these remarks and the instant litigation. Thus, she has not proffered any evidence or even suggested that evidence might exist that will show how these remarks relate to the instant claim of retaliation. For this reason, direct evidence of retaliation will not defeat Fannie Mae's Motion for Summary Judgment.

2. Indirect evidence of retaliation

If a plaintiff cannot defeat a motion for summary judgment through direct evidence, she may use the three part burden-shifting test laid out in McDonnell Douglas v. Green, 411 U.S. 792 (1973). See O'Donnell, 645 A.2d at 1086 (D.C. 1994) (Courts use the burden of proof for a claim of disparate treatment based on federal law in applying the DCHRA). First, the plaintiff must establish a prima facie case of retaliation. McDonnell Douglas, 411 U.S. at 1824. Next, the defendant must articulate a legitimate nondiscriminatory reason for its decision or

action. Id. Finally, the plaintiff must establish by a preponderance of the evidence that the defendant's articulated reason is pretextual. Id.; St. Mary's Honor Center v. Hicks, 509 U.S. 502, 514 (1993).

a. The Senior Vice President position

Carpenter claims that Fannie Mae retaliated against her by not selecting her to be Senior Vice President. Regardless of whether Carpenter can establish a prima facie case, Fannie Mae has articulated a legitimate nondiscriminatory reason for its action; Carpenter did not possess the qualifications Fannie Mae sought for the Senior Vice President. The Position Description sought a person with "substantial litigation or litigation management experience." As a Vice President in the Legal Department, it is undisputed that Carpenter lacks litigation experience. At the time Fannie Mae filed this motion, it had not yet selected the Senior Vice President, but had narrowed down the pool to three external candidates. Each of these candidates had extensive litigation experience. Furthermore, Fannie Mae selected no internal Vice President to be in the pool of candidates chosen for further consideration, including Vice Presidents who received a higher performance rating than Carpenter. Yet, Carpenter alleges that Fannie Mae's litigation experience requirement is a pretext for retaliation because Fannie Mae lawyers do

not engage directly in litigation and because she is qualified to be Senior Vice President.[2]

"'Denial of a Rule 56(f) application is proper where it is clear that the evidence sought is almost certainly nonexistent or is the object of pure speculation.'" Campbell, 138 F.3d at 779-80. Through discovery, Carpenter suggests that she can find out the "real reasons" for not selecting Carpenter and the reason Fannie Mae's legal department needs an attorney with litigation experience. But, here it is undisputed that each member of the narrowed pool of candidates for Senior Vice President possessed significant litigation experience. It is further undisputed that Fannie Mae selected none of its Vice Presidents for further consideration. That Fannie Mae did not really seek litigation experience is purely Carpenter's guess. Undisputed facts suggest otherwise. Carpenter's request for discovery fails to state with specificity which new facts she believes can be obtained by discovery or the

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[2] Though Carpenter seeks discovery to show that the litigation experience requirement is a pretext, she does not suggest that she requires further discovery to show that she is qualified. She has presented evidence of her qualifications in her opposition. Nonetheless, that she may be qualified to be Senior Vice President will not defeat her summary judgment motion. The Court will not intrude on an employer's "unfettered discretion to choose among qualified candidates." Fishbach v. District of Columbia Dept. of Corrections, 86 F.3d 1180, 1183 (D.C. Cir. 1996).

facts she specifically needs to support her theory. "Something more than a fanciful allegation is required to justify denying a motion for summary judgment, ..., A bare assertion that the evidence supporting a plaintiff's allegation is in the hands of the defendant is insufficient to justify a denial of a motion for summary judgment under Rule 56(f)." Contemporary Mission v. United States Postal Service, 648 F.2d 97, 107 (2d Cir. 1981).

Additionally, the resumes of the candidates selected for further consideration reveal that they are all accomplished attorneys who meet the other criteria Fannie Mae requested in its Position Description. Thus, the Court can assume Fannie Mae considered these candidates qualified. Carpenter's resume and work history suggest that she also meets these criteria, and is, therefore, qualified in these other respects. But, short of an error too obvious to be unintentional, the Court will respect Fannie Mae's "unfettered discretion to choose among qualified candidates." Fishbach v. District of Columbia Dept. of Corrections, 86 F.3d 1180, 1182 (D.C. Cir. 1996). Therefore, the Court will grant summary judgment with respect to Carpenter's claim that Fannie Mae retaliated against her when it denied her the Senior Vice President position.

b. Carpenter's downgrade

Carpenter alleges that Fannie Mae retaliated against her when it gave her a 4+ rating for 1997 rather than a 5- or higher. She reasons that because she previously received a 5- and her performance has not changed, she must have earned a 5- for 1997. Fannie Mae explains, however, that the group of Vice Presidents expanded and became more competitive in 1997 as a result of a July 1996 reorganization. The ratings Vice Presidents receive are determined by comparing performance among Vice Presidents. The 1997 ratings compared Carpenter to Vice Presidents to whom she had never been compared. Of those Vice Presidents that received higher ratings than Carpenter, only one had been compared to Carpenter previously and that person had previously received a higher rating than Carpenter. Fannie Mae cites negative evaluations Carpenter received from Senior Vice Presidents in various departments and contrasts those with uniformly positive comments other Vice Presidents received in explaining Carpenter's rating. This explanation is a legitimate, non-discriminatory reason for Carpenter's downgrade.

Carpenter attempts to show pretext by introducing evidence of positive evaluations she received from the staff

of the Senior Vice Presidents who criticized her. She argues that these positive comments contradict with the negative evaluations she received and show that the Senior Vice Presidents acted with a retaliatory motive by giving negative evaluations. Carpenter suggests that through further discovery she can show that the Senior Vice Presidents who criticized her performance fabricated these criticisms to conceal a retaliatory motive. She also asserts that she can show pretext through further discovery by showing that the Vice Presidents who received better ratings than she did performed at the same level or worse than she did.

If Carpenter were able to show that Fannie Mae encouraged Senior Vice Presidents to fabricate criticisms, this would be evidence of a retaliatory motive. A plaintiff, however, cannot defeat a motion for summary judgment "by merely restating the conclusory allegations contained in his complaint and amplifying them only with speculation about what discovery might uncover." Contemporary Mission, Inc. v. United States Postal Service, 648 F.2d 97, 107 (2d. Cir. 1981); see also Novecon, Ltd. v. Bulgarian-American Enterprise Fund, et al., 977 F.Supp. 52, 55 (D.D.C. 1997) ("'if the court determines that, ... discovery would be wholly speculative, relief under Rule 56(f) must

be denied'") quoting Greenberg v. FDA (citation omitted). Here, Carpenter is merely speculating that Senior Vice Presidents fabricated criticisms of her. Nothing suggests that she can obtain evidence to support this. The fact that she received commendations from the staff of the Senior Vice Presidents does not support her allegation of fabrication. There is nothing inconsistent about Carpenter receiving positive feedback from the staff of Senior Vice Presidents and receiving specific criticisms from the Senior Vice Presidents themselves. In keeping with case law, this Court will not permit Carpenter to engage in an open-ended exploration in the hopes of discovering evidence that might support her claim. Carpenter's suggestion that discovery might reveal evidence that the Senior Vice Presidents fabricated criticisms of her will not defeat Fannie Mae's summary judgment motion.

Carpenter suggests that discovery might show that other Vice Presidents performed no better or perhaps worse than she did. Even if discovery might reveal that she actually performed better, this will not satisfy Carpenter's burden. Rather, absent a showing that Fannie Mae made an error too obvious to be unintentional, to show pretext, Carpenter must show that Fannie Mae actually believed that she performed better that other vice presidents. See

Fishbach, 86 F.3d at 1182 (in showing pretext, the issue is not the correctness or desirability of the reasons it offer, but whether the employer honestly believes the reasons it offers). Though Carpenter states that Fannie Mae believed she performed better, like her other claims, this statement is purely speculation and will not satisfy her burden under Rule 56(f).

III. Conclusion

Upon consideration of Defendant's Motion for Summary Judgment, Plaintiff's Motion in Opposition and Defendant's Reply thereto, it is by the Court this 3rd day of August 1998,

ORDERED, that Defendant's Motion for Summary Judgment be and hereby is **GRANTED**; and it is

FURTHER ORDERED, that this case be and hereby is **DISMISSED WITH PREJUDICE**

/s/ Aubrey E. Robinson, Jr.
United States District Judge